A

ANNE LIM KENG SEE

v.

THE NEW STRAITS TIMES PRESS (M) BHD & ANOR AND OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA

C [CIVIL APPEAL NOS: W-02-199-2002, W-02-443-2002 & W-02-759-2002]
21 MARCH 2008

CIVIL PROCEDURE: *Parties - Proper parties to be sued, whether - Defamation action - Persons liable for publication of libel in newspaper - Whether newspaper itself can be sued - Malay Mail not a legal entity and cannot be named as a party in any action - Whether judgment in default obtained against Malay Mail a nullity - Whether judgment can be set aside - Whether Malay Mail should be struck out as a party*

D

E ***CIVIL PROCEDURE:*** *Parties - Locus standi - Judgement in default obtained against Malay Mail newspaper, a non-legal entity - Correct party to apply to set aside judgment is owner and publisher of Malay Mail*

F ***TORT:*** *Defamation - Libel in newspaper - Advertisement of notice of substituted service of bankruptcy notice in newspaper - Notice issued on authority of court - Whether advertisement privileged under s. 12(1) of Defamation Act 1957 - Whether publication of notice of substituted service by newspaper is mala fide*

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CIVIL PROCEDURE: *Trial - Preliminary points of law - Whether to allow application to determine preliminary point of law - Whether preliminary point raised is a complex issue or based on hypothetical facts - Whether determining question posed would substantially dispose of whole*

H *action*

Pursuant to a judgment in default obtained by MBf Finance Bhd against the appellant for payment of certain sums, a bankruptcy notice was issued against the appellant. The appellant subsequently fully paid and settled the judgment debt. However, the solicitors for MBf Finance Bhd, unaware that the judgment sum had been

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settled, obtained an order for substituted service of the bankruptcy notice to be effected, *inter alia*, by way of advertisement in a local newspaper. The advertisement appeared in the 22 January 2001 issue of the Malay Mail. The appellant demanded an apology but met with no response and hence filed this defamation suit against Malay Mail and the 1st respondent, as the owner of the Malay Mail.

The appellant obtained judgment in default of appearance against the Malay Mail. The 1st respondent consequently applied to set aside the said judgment and the application was allowed. The appellant contended that since the default judgment was made against the 2nd defendant the application to set it aside should be made by the 2nd defendant. The 1st respondent on the other hand filed an application to strike out the Malay Mail as a party pursuant to O. 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('the Rules') and under the inherent jurisdiction of the court on the grounds that the Malay Mail was not a legal entity and was merely the name of one of the newspapers that the 1st respondent published. The court allowed the 1st respondent's application. The 1st respondent also filed an application pursuant to O. 33 r. 2 of the Rules praying for an order that the following preliminary issue be tried before the trial of this action, namely, whether the 1st respondent was entitled to rely upon the defence of qualified privilege under s. 12 of the Defamation Act 1957 ('the Act') premised upon, *inter alia,* the fact that the said advertisement was published pursuant to an order of the High Court of Malaya pursuant to the Rules, the Bankruptcy Act 1967 and the Bankruptcy Rules 1969. The court ruled that the 1st respondent was protected by s. 12 of the Act and consequently ordered that the appellant's action be dismissed with costs. The appellant filed three appeals against these decisions.

Held (dismissing the 1st, 2nd and 3rd appeals with costs)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

(1) The Malay Mail was not a legal entity. It was but a newspaper product which was owned and published by the 1st respondent. As such "the Malay Mail" cannot be named as a party in any action. In cases involving libel, the persons who can be held liable for the publication of the libel in a

A newspaper are the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper but not the newspaper. (para 26)

(2) The judgment in default obtained against the Malay Mail was
B a nullity. The judge was clearly entitled to set aside the judgment in default obtained against the Malay Mail and consequently striking it out as a party. (para 27)

(3) The 1st respondent had the *locus standi* and was the correct
C party to make the application to set aside the judgment in default obtained against the Malay Mail. The 1st respondent was the owner and publisher of the Malay Mail and was the person in law capable of making the application, the Malay Mail not being a legal entity. (para 31)

D **(4)** There was no malice of the part of the 1st respondent when it published the advertisement. The advertisement was a notice issued by or on the authority of the court and hence was privileged pursuant to s. 12(1) of the Act unless the appellant could show malice. (para 49)

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(5) A mere reproduction by the 1st respondent of a notice of substituted service in the Malay Mail upon a payment of a fee or a service charge cannot be said to be *mala fide*. The 1st respondent had the absolute right to publish the said
F advertisement. (para 55)

(6) This was clearly a case where the determination of the question posed would substantially dispose of the whole action. The preliminary point raised was not a complex issue which required the matter to go for full trial. It was clearly
G not based on hypothetical facts. It dealt with a single point of law which, after having been decided in favour of the 1st respondent, was decisive and had disposed of the entire litigation. (para 70)

H ***Bahasa Malaysia*** *Translation Of Headnotes*

Berterusan dari sesuatu penghakiman ingkar yang diperolehi oleh MBf Finance Bhd terhadap perayu untuk pembayaran jumlah tertentu, sesuatu notis kebankrapan telah dikeluarkan terhadap
I perayu. Perayu kemudiannya membayar penuh dan menyelesaikan hutang penghakiman tersebut. Walau bagaimanapun, peguam

untuk MBf Finance Bhd, yang tidak sedar bahawa jumlah penghakiman telah diselesaikan, memperolehi sesuatu perintah untuk penyampaian ganti notis kebankrapan dilaksanakan, antara lain, melalui sesuatu iklan di sebuah surat khabar tempatan. Iklan tersebut disiar di dalam isu 22 Januari 2001 Malay Mail. Perayu menuntut untuk permintaan maaf tetapi tidak terdapat apa-apa respons dan oleh itu memfail guaman fitnah ini terhadap Malay Mail dan responden pertama, pemilik Malay Mail.

Perayu memperolehi penghakiman ingkar kerana ketidakhadiran menentang Malay Mail. Responden pertama oleh yang demikian memohon untuk mengenepikan penghakiman tersebut dan permohonannya dibenarkan. Perayu menghujah bahawa oleh sebab penghakiman ingkar telah dibuat menentang defendan kedua permohonan untuk mengenepikannya patut dibuat oleh defendan kedua. Responden pertama, walau bagaimanapun, memfail sesuatu permohonan untuk membatalkan Malay Mail sebagai sesuatu pihak di bawah A. 18 k. 19(1)(b), (c) dan (d) Kaedah-kaedah Mahkamah Tinggi 1980 ('Kaedah-kaedah') dan di bawah bidang kuasa sedia ada mahkamah di atas alasan bahawa Malay Mail bukan sesuatu entiti undang-undang dan hanya merupakan nama salah satu surat khabar yang diterbitkan oleh responden pertama. Mahkamah membenarkan permohonan responden pertama. Responden pertama juga memfail sesuatu permohonan di bawah A. 33 k. 2 Kaedah-kaedah menuntut suatu perintah bahawa isu permulaan yang berikutnya untuk dibicara sebelum perbicaraan tindakan ini, iaitu, sama ada responden pertama berhak gantung kepada pembelaan perlindungan bersyarat di bawah s. 12 Akta Fitnah 1957 ('Akta') kerana, antara lain, fakta bahawa iklan tersebut telah diterbitkan mengikuti sesuatu perintah Mahkamah Tinggi Malaya di bawah Kaedah-kaedah, Akta Kebankrapan 1967 dan Kaedah-kaedah Kebankrapan 1969. Mahkamah memutuskan bahawa responden pertama dilindungi oleh s. 12 Akta dan oleh yang demikian membuat perintah untuk menolak tindakan perayu. Perayu memfail tiga rayuan menentang keputusan tersebut.

Diputuskan (menolak rayuan pertama, kedua dan ketiga dengan kos)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Malay Mail bukan sesuatu entiti undang-undang. Ia hanyalah sesuatu produk surat khabar yang dimiliki dan diterbitkan oleh responden pertama. Oleh itu "the Malay Mail" tidak boleh

A dinamakan sebagai sesuatu pihak dalam apa-apa tindakan. Dalam kes-kes yang melibatkan libel, orang yang boleh dikatakan bertanggungjawab untuk terbitan libel dalam sesuatu suratkhabar ialah penulis libel tersebut dan pemilik, penyunting, pencetak, penerbit dan penjual suratkhabar tersebut tetapi
B bukan suratkhabar tersebut.

(2) Penghakiman ingkar yang diperolehi terhadap Malay Mail ialah sesuatu pembatalan. Hakim jelas berhak mengenepikan penghakiman ingkar yang diperolehi terhadap Malay Mail dan
C oleh yang demikian membatalkannya sebagai sesuatu pihak.

(3) Responden pertama mempunyai *locus standi* dan merupakan pihak yang betul untuk membuat permohonan untuk mengenepikan penghakiman ingkar yang diperolehi menentang Malay Mail. Responden pertama ialah pemilik dan penerbit
D Malay Mail dan merupakan orang di sisi undang-undang yang boleh buat permohonan sebegitu, kerana Malay Mail bukan sesuatu entiti undang-undang.

(4) Tidak ada niat jahat pada pihak responden pertama apabila ia
E menerbit iklan tersebut. Iklan tersebut merupakan notis yang dikeluarkan oleh atau pun di atas autoriti mahkamah dan oleh itu terlindung mengikut s. 12(1) Akta melainkan perayu boleh tunjuk niat jahat.

F **(5)** Sesuatu reproduksi penyampaian ganti notis di dalam Malay Mail ke atas pembayaran sesuatu fee atau caj penyampaian tidak boleh dikatakan *mala fide*. Responden pertama mempunyai hak mutlak untuk menerbit iklan tersebut.

G **(6)** Ini jelas sesuatu kes di mana penentuan soalan yang dikemukakan akan menyelesaikan seluruh tindakan secara substantif. Perkara permulaan yang dibangkit bukan sesuatu isu kompleks yang memerlukan sesuatu perbicaraan penuh. Ia dengan jelas tidak berasaskan fakta hipotesis. Ia menangani
H hanya satu perkara undang-undang yang, setelah diputuskan menyokong responden pertama, adalah muktamad dan menyelesaikan seluruh litigasi tersebut.

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Case(s) referred to:

Allen v. Gulf Oil Refining Ltd [1981] 1 All ER 353 ***(refd)***
Beach v. Freeson [1972] 1 QB 14 ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co [1969] 1 Ch 93 ***(refd)***
Everett v. Ribbands [1952] 1 KB 112 ***(refd)***
Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 CLJ 539; [1992] 4 CLJ (Rep) 275 ***(refd)***
Keays v. Murdoch Magazines (UK) Ltd and Another [1991] 4 All ER 491 ***(refd)***
Lazard Brothers and Company v. Banque Industrielle De Moscou [1932] 1 KB 617 ***(refd)***
Morris and Another v. Sandess Universal Products [1954] 1 All ER 47 ***(refd)***
Royal Aquarium and Summer and Winter Garden Society, Limited v. Parkinson [1892] 1 QB 431 ***(refd)***
Searles v. Scarlett [1892] 2 QB 56 ***(refd)***
Tilling v. Whiteman [1979] 1 All ER 401 ***(refd)***

Legislation referred to:

Bankruptcy Rules 1969, rr. 97, 110
Defamation Act 1957, ss. 2, 12(1)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d), O. 33 r. 2, O. 78 r. 3(3)
Interpretation Acts 1948 and 1967, s. 3

Rules of the Supreme Court [UK], O. 25 r. 2
Supreme Court Practice [UK], O. 82 r. 3(3)

Other source(s) referred to:

The Supreme Court Practice - Malaysia Edition, 1996, Reprint of 1979, edn, vol 1, p 1297

For the appellant - Arunachalam Ramiah (Noorhafiza Izura Ab Llah with him); M/s Arun & Co
For the respondents - Lorraine Cheah; M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-23-48-2001]

Reported by Amutha Suppayah

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] These three appeals arose from the same suit. At the request of the parties, Civil Appeal No: W-02-199-2002 and Civil Appeal No: W-02-759-2002 were heard together (hereafter referred to as

A the 1st and 2nd appeals, respectively). Civil Appeal No: W-02-443-2002 was heard separately (hereafter referred to as the 3rd appeal).

The Suit

B **[2]** On 28 May 2001, the appellant (the plaintiff in the court below) filed this action against the 1st respondent (the 1st defendant in the court below), a newspaper publishing company following an advertisement of a notice of substituted service of a C bankruptcy notice directed against the appellant (hereafter referred to as "the said advertisement") which appeared in 22 January 2001 issue of "the Malay Mail", ie, the 2nd respondent (the 2nd defendant in the court below and hereafter referred to as "the Malay Mail"), an afternoon daily printed by the 1st respondent.

D **[3]** The appellant claims that she is a well-known businesswoman who owns a registered business enterprise known as Golden Kintex and is also a director of several locally incorporated companies. She also claims that she is a well-known writer and a "Goodwill Ambassador" of an association known as Persatuan E Kebajikan Haiwan.

[4] It is her contention that the said advertisement contained words which are defamatory of her. The said advertisement reads:

F Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Dagang)

Dalam Perkara Kebankrapan No: D2-29-4162 Tahun 1999

Berkenaan: Anne Lim Keng See
(No. K/P: A 0149182) ... Penghutang Penghakiman
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Ex-Parte: MBF Finance Berhad ... Pemiutang Penghakiman

NOTIS PENYAMPAIAN GANTI

Kepada:
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Anne Lim Keng See
11, Jalan 13/46,
Bandar Tasik Selatan,
57000 Kuala Lumpur.

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Ambil Perhatian bahawa suatu tindakan telah dimulakan terhadap kamu di Mahkamah Tinggi Kebankrapan D2-29-4162-1999 oleh MBF Finance Berhad yang beralamat di Tingkat 2, Wisma MBF, Jalan Pudu, 55100 Kuala Lumpur dan Mahkamah Yang Mulia ini telah memerintahkan bahawa Notis Kebankrapan ini diserahkan kepada kamu secara Penyampaian Ganti dengan menampalkan sesalinan Perintah dan sesalinan Notis Kebankrapan di Papan Notis Mahkamah Tinggi Kuala Lumpur, di alamat terakhir Penghutang Penghakiman di 11, Jalan 13/46, Bandar Tasik Selatan, 57000 Kuala Lumpur serta melalui bentuk iklan dalam suratkhabar tempatan dan penyampainan tersebut adalah sempurna dan cukup terhadap Penghutang Penghakiman selepas (7) hari dari tarikh penyampaian dan pengiklanan.

Notis Kebankrapan ini boleh diperiksa oleh kamu di atas permohonan di Mahkamah Tinggi Kuala Lumpur.

Bertarikh pada 6hb September, 2000

Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Kuala Lumpur

Notis Penyampaian Ganti ini difailkan oleh Tetuan T.K. Ooi, Loo & Partners yang beralamat di Blok A, Tingkat 10, Wisma Yakin, Jalan Masjid India, 50100 Kuala Lumpur, peguamcara bagi Pemiutang Penghakiman.

(Ruj Kami : MBF-PU/LOC/24-93).

[5] The appellant avers that the said advertisement clearly referred to her. She claims that in their natural and ordinary meaning, the words meant and were understood to mean as follows:

(a) that she is unable to settle her debts;

(b) that she is facing financial problems;

(c) that she is not credit-worthy;

(d) that others who have business dealings with her should terminate such dealings;

(e) that she suffers from financial problems and is facing bankruptcy and is unable to settle her debts to creditors;

A (f) that financial institutions and other institutions be put on alert as to take immediate steps before she is declared a bankrupt;

(g) that she may at anytime be adjudicated bankrupt and all her assets may be seized and be placed under the official assignee; and

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(h) that she has failed to settle her debts and is trying to avoid service of the bankruptcy notice.

[6] The appellant further claims that the said advertisement is C not true and is false and by reason of the said advertisement, she has been gravely injured in her character and reputation, suffered catastrophic distress and embarrassment and has been brought into public scandal, odium and contempt and is injured in her character, credit and reputation and has suffered damages and/or D special damages the particulars of which are as follows:

(a) that she and her husband and family have been taunted, insulted and had suffered anxiety and depression which has caused her additional hurt, anxiety, loss of business and profits and embarrassment; and

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(b) that she also had "to confront added insult and hurdle" as her bank account has been frozen or legally blocked which crippled the free usage of her funds kept in the banks and financial institutions thus disabling her from financing her F business contracts and commitments as a result of which the contracts were terminated which brought huge loss and damage in the amount of RM5,000,000.

[7] In the alternative, she prays for aggravated and/or exemplary G damages as per, *inter alia*, the following particulars:

(a) the said advertisement was published in a newspaper which has wide readership throughout the country and was published to attract the attention of the public;

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(b) she has contacted the respondents and informed them that the said advertisement was not true and false and requested that the same be withdrawn but the respondents did not take any action;

I (c) the publication of the said advertisement clearly injured her reputation;

(d) in any event the respondents did not contact her before the said advertisement was published or any other party who directed the respondents to advertise the libel, to ensure the truth of the contents of the said advertisement; the respondents also know that this is the usual practice adopted by responsible news printers; however, the respondents acted intentionally and *mala fide* when they advertised the libel as their only interest is to make profit out of the said advertisement; and

(e) her solicitors have informed the respondents that the said advertisement is not true and false but the respondents did not tender any apology nor took any action to withdraw the said advertisement.

[8] Under the circumstances, the appellant prays for the following reliefs:

(a) loss and damages including special damages, aggravated and/or exemplary damages for the libel amounting to RM50,000,000;

(b) interest from 22 January 2001 until the date of full realisation;

(c) costs; and

(d) any other relief as deemed appropriate by the court.

The Defence

[9] The 1st respondent admits that it is a publishing company and that amongst its publication is the Malay Mail but contends that the Malay Mail is not itself a separate legal and/or corporate entity and as such denies that the name "Malay Mail" can be sued and hence reserve its rights to apply for the name "Malay Mail" to be struck out from these proceedings.

[10] The 1st respondent further admits that 22 January 2001 issue of the Malay Mail contained the said advertisement but denied that the words in the said advertisement referred to or were understood to refer to or were capable of referring to the appellant. Further, if which is denied, the said words referred to or were understood to refer to the appellant, it is denied that they bore, or were understood to bear or were capable of bearing the meanings pleaded in the statement of claim or any meaning defamatory of the appellant.

[11] Further or alternatively, the 1st respondent contends that the words complained of were contained in an advertisement published on the authority of the High Court, Kuala Lumpur in accordance with law and by reason thereof, the publication is protected by privilege under s. 12 of the Defamation Act 1957 ("the Act") read together with para. 3 of Part I of the Schedule to the Act referred thereto. In relation to this the 1st respondent pleaded the following particulars:

(a) on or about 18 January 2001, the 1st respondent received a written request by a firm of solicitors, Messrs TK Ooi, Loo & Partners to publish the order for substituted service of the bankruptcy notice on one Anne Lim Keng See, *viz*., the appellant;

(b) the written request was accompanied by a copy of the order for substituted service which bore the seal of the High Court, Kuala Lumpur;

(c) by the said order made on 6 September 2000, the bankruptcy notice against the appellant was to be served by way of an advertisement in a local newspaper and that was deemed to be good and sufficient service;

(d) the 1st respondent will refer to and rely on the order made on 6 September 2000 for its full term and effect at the trial;

(e) in the premises, the publication is privileged by virtue of s. 12 of the Act read together with para, 3 of Part I of the Schedule to the Act.

[12] By reason of the matters aforesaid, the 1st respondent avers that it is and was not liable for any damages for libel as pleaded in the statement of claim or at all.

[13] The 1st respondent denies that the appellant suffered injuries to her character and/or reputation or was or has been at any time brought into public scandal, odium and contempt or at all. It was further denied that the publication of the said advertisement was *mala fide* or with malice, as alleged or at all. The 1st respondent contends it published the said advertisement in the usual course of business and honestly believing it to be a notice required to be published on the authority of the High Court. In any event, the 1st respondent avers that by virtue of

the status of the statement and being an order of court, it honestly and in good faith believed that it was proper to publish it and denies that the motive for publication was to make profit.

The 1st appeal

[14] On 19 September 2001, the appellant obtained judgment in default of appearance against the Malay Mail. The 1st respondent consequently applied to set aside the said judgment and the application was allowed by the learned deputy registrar. The appellant appealed against that decision to the judge in chambers. The learned judge was of the view that the learned deputy registrar arrived at the correct decision and on 21 February 2002 dismissed the appeal.

[15] In his grounds of judgment the learned judge said:

> It was contended by the Counsel for the 1st Defendant that the 2nd Defendant was not a legal entity registered with either the Registrar of Companies or the Registrar of Businesses. The Malay Mail was one of the many newspaper products produced by the 1st Defendant. In the circumstances of this case I concluded that the 2nd Defendant is not a legal entity.
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> In cases of defamation, involving defamation by a newspaper the parties responsible or answerable for the matters that have been published in the newspaper are the author, proprietor, editor, printer, publisher and vendor of the newspaper concerned but not the newspaper itself. This position is clearly stated in *Halsbury's Law of England* 4th Edition at p. 19 (para 38):
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> > 38. Joint And Several Liability.
> >
> > Every person who takes part in or procures the publication of a libel is *prima facie* liable jointly and severally for all damages caused by it. Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper are *prima facie* jointly and severally liable.
>
> And at p. 1531, para 81/1/7 of the Supreme Court Practice, it is stated:
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> > The name of a newspaper is not usually a name under which the proprietors carry on the business and they should not be sued.

A Because the 2nd Defendant, The Malay Mail, is not a legal entity it should not have been sued as a party. As such the order made against it should be set aside *ex-debito justicae*. In para 13/9/6 Order 13 the Supreme Court Practice 1999 Vol. 1 it is stated:

> B Judgment Set Aside By The Court Of Its Own Motion - If it comes to the knowledge of the Court that it has entered judgment in default of acknowledgment of service against a man who at the material time was dead or a company which at such time was dissolved or non-existent according to the law of its country or origin the Court is C bound after hearing the parties interested, of its own motion to set the judgment aside. Such judgment is null and void.

In my view, the 2nd Defendant, the Malay Mail, comes with such category of non-existent entity. As such the judgment entered against the 2nd Defendant earlier was null and void. On this D matter I need only to refer to the Supreme Court case of *Syarikat Joo Seng & Anor v. Habib Bank Ltd* [1986] 2 MLJ 129. In this case the Respondent had brought a writ action against the Appellants. The Appellants entered a conditional appearance and applied to strike off the writ and the statement of claim. The application was dismissed on June 4, 1984 and notice of appeal E was filed on June 29, 1984. However on June 22, 1984 the Respondent without obtaining leave of the Court entered a judgment in default of defence against the Appellants. The Appellants applied to set aside the default judgment and this was refused by the High Court. The Appellants appealed to the F Supreme Court. In allowing the appeal the Supreme Court ruled:

> In this case the respondents should have complied with Order 19 rule 7(1) of the Rules of the High Court by applying to the Court or a judge for leave to enter judgment against the appellants. This they failed to do and G therefore the judgment was an irregular judgment obtained in direct contravention of Order 19 rule 7(1). The Appellants are therefore entitled *ex-debito justicae* to have the default judgment set aside.

H In the instant case, the Counsel for the Plaintiff contended that the 1st Defendant who made this application to set aside the judgment in default had no *locus standi* to bring this application. The Plaintiff argued that since the default judgment was made against the 2nd Defendant the application to set it aside should be made by the 2 Defendant.

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In my view there were no merits in the Plaintiff's contention. The 2nd Defendant is not a legal entity. It cannot be sued and therefore has no capacity to sue. As such the 2nd Defendant does not have the legal capacity to bring any action in Court including the application to set aside the default order. Since the 1st Defendant is the owner of the 2nd Defendant, it has the power to bring any action concerning itself as well as its own assets, including the 2nd Defendant. In the light of the relationship between the 1st Defendant and the 2nd Defendant and having regard to the legal capacity of the 2nd Defendant it was quite clear to me that any action concerning the 2nd Defendant should be brought by the 1st Defendant and not the 2nd Defendant. Therefore the 1st Defendant has the *locus standi* to make this application.

In the light of the reasons as I have stated above I arrived at the decision that the Plaintiff's appeal against the decision of the learned Deputy Registrar be dismissed with costs.

The 2nd Appeal

[16] On 26 September 2001 the 1st respondent filed an application to strike out the Malay Mail as a party pursuant to O. 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ("the Rules") and under the inherent jurisdiction of the court on the following grounds:

(a) that the Malay Mail is not a legal entity; it is the name of one of the newspapers that the 1st respondent publish;

(b) that the appellant has been informed of this and was invited to withdraw her claim against the Malay Mail but refused;

(c) that the appellant has asked the 1st respondent to enter appearance on behalf of the Malay Mail and threatened to enter judgement in default if this is not done; and

(d) that the 1st respondent now face the very real risk that the appellant will embarrass them by entering judgment against the Malay Mail which is a non-existent entity and publicise this to their detriment.

[17] The learned deputy registrar allowed the application and struck out the Malay Mail as a party. The appellant appealed to the judge in chambers. On 28 August 2002 the learned judge dismissed the appeal.

A **The 3rd Appeal**

[18] Meanwhile on 30 October 2001 the 1st respondent filed an application made pursuant to O. 33 r. 2 of the Rules praying for an order that the following preliminary issue be tried before the
B trial of this action, namely, whether the 1st respondent is entitled to rely upon the defence of qualified privilege under s. 12 of the Act premised upon the following facts:

(a) the 1st respondent is the publisher of the Malay Mail;

C (b) that the said advertisement has been published in the Malay Mail; and

(c) that the said advertisement was published pursuant to an order of the High Court of Malaya pursuant to the Rules, the
D Bankruptcy Act 1967 and the Bankruptcy Rules 1967.

[19] The 1st respondent provided the following reasons for the application, namely:

(i) that it is the publisher of the Malay Mail and is entitled to
E rely on the defence of qualified privilege under s. 12 of the Act;

(ii) that the appellant did not file any reply to the statement of defence filed by the 1st respondent;

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(iii) in the eventuality this application is allowed, the whole action can be disposed without the necessity of undergoing a full trial.

[20] This application by the 1st respondent made pursuant to
G O. 33 r. 2 of the Rules was strenuously objected to by the appellant. The learned judge then ordered counsel for the parties to furnish written submissions and on 23 May 2002 ruled that the 1st respondent is protected by s. 12 of the Act and consequently ordered that the appellant's action be dismissed with costs.

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[21] Before the learned judge, counsel for the 1st respondent pointed out that the 1st respondent received a request from Messrs TK Ooi, Loo & Partners, solicitors for MBf Finance Berhad, ie, the judgement creditor, to publish the said
I advertisement through a newspaper as ordered by the High Court and as such should not be liable to the appellant for defamation

for the publication since such act falls squarely within the ambit of s. 12 of the Act read with para. 3 of Part I of the Schedule to the Act. Counsel also stressed that the 1st defendant had no malice in publishing the said advertisement. Counsel referred to s. 12 of the Act, para. 3 of Part I of the Schedule to the Act and s. 2 of the Act on the meaning of the word "newspaper" to support his contention. Counsel then submitted that if the court makes a finding that the 1st respondent is indeed entitled to rely upon s. 12 of the Act read together with para. 3 of Part 1 of the Schedule to the Act, the entire suit can be disposed of at this stage without the need for the matter to proceed to trial.

[22] Section 12 of the Act (the side-note reads "Qualified privilege of newspapers") provides as follows:

> (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

Paragraph 3 of Part I of the Schedule to the Act reads:

> 3 A notice, advertisement or report issued or published by or on authority of any court within Malaysia or any judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

As to the meaning of the word "newspaper", s. 2 of the Act reads:

> newspaper" means any paper containing public news or observations thereon or consisting wholly or mainly of advertisements which is printed for sale and is published in Malaysia either periodically or in parts or numbers at intervals not exceeding thirty-six days;.

[23] In opposing the application the appellant contended that the said advertisement published by the 1st respondent was untrue as she was not indebted to the judgment creditor and as such the 1st respondent has committed libel and could not rely upon s. 12 of the Act as a defence.

[24] The learned judge allowed the 1st respondent's application and consequently dismissed the appellant's suit with costs. In his grounds of judgment, the learned judge said:

> I was unable to agree with the Plaintiff's argument. For purpose of a defence under s. 12 of the Defamation Act, all that the 1st Defendant needed to prove was that there was actually an Order of the Court asking such advertisement to be published in the newspaper. This had not been disputed. The non-truthfulness of the Plaintiff's debt to the Judgment Creditor would be a matter for the Plaintiff to state at the Bankruptcy Court as a ground to set aside the Bankruptcy Notice or order. The only ground that the 1st Defendant would not be allowed to invoke s. 12 as a defence is if the publication was done with malice. On the facts of this case there was no evidence of malice whatsoever by the 1st Defendant in advertising the publication. It genuinely had no knowledge that the Plaintiff's indebtedness to the Judgment Creditor was untrue.
>
> After having considered the whole circumstances this case including the submissions by Counsels from both parties I decided to allow the 1st Defendant's application. As a matter of fact the 1st Defendant's application was very much in conformity with the spirit of newly included O. 14A of the High Court Rules 1980 which authorises the Court to dispose off summarily appropriate cases based on affidavit evidence instead of going through lengthy hearing by calling witnesses.
>
> Having regard to the whole circumstances of this case I was fully satisfied that this case could be disposed off by first determining the preliminary legal issue as raised by the 1st Defendant in this application. And I was also satisfied that the 1st Defendant was entitled to rely upon the defence of qualified privilege by virtue of s. 12 of the Defamation Act 1957. I therefore allowed the 1st Defendant's application with costs.

Judgment Of This Court In Relation To The 1st And 2nd Appeals

[25] As discussed earlier, all parties agreed that the 1st and 2nd appeals be heard together as they are inter-related. After hearing the parties, we unanimously dismissed the 1st and 2nd appeals with costs and ordered that the deposits be remitted to the 1st respondent to the account of taxed costs.

[26] We agree with the learned judge that the Malay Mail is not a legal entity. It is but a newspaper product which is owned and published by the 1st respondent and the name "Malay Mail" is not the name under which the 1st respondent carry on its business. As such "the Malay Mail" cannot be named as a party in any action. We would also agree with the learned judge that in cases involving libel, the persons who can be held liable for the publication of the libel in a newspaper are the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper but not the newspaper.

[27] Thus, we are of the view that the judgment in default obtained against the Malay Mail is a nullity. The "Malay Mail" is not a legal entity on the date the writ was issued and is not even a name under which the 1st respondent is carrying on its business. As such the learned judge was clearly entitled to set aside the judgment in default obtained against the Malay Mail and consequently striking it out as a party.

[28] A case on point is *Lazard Brothers and Company v. Banque Industrielle De Moscou* [1932] 1 KB 617. In that case the court held that if it comes to the knowledge of the court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the court is bound, after hearing the parties interested, of its own motion to set the judgment aside.

[29] The facts of *Lazard Brothers* are as follows. An English firm commenced an action in 1930 against the Banque Industrielle De Moscou ("BIM") which was domiciled in Russia. The writ was served, after obtaining leave from the court, by posting it by registered letter to BIM's head office in Moscow. No appearance having been entered, judgment was signed against BIM. Subsequently a letter was received from the London Embassy of the Soviet Republic stating that the notice of the writ could not be delivered as BIM went out of existence in 1917. Meanwhile, having obtained judgment by default, the plaintiffs obtained a garnishee order *nisi* against the Midland Bank, an English bank attaching money alleged to be due from that bank to BIM and that order was subsequently made absolute. The Midland Bank appealed. On appeal, the judgment by default on which the

garnishee order nisi was founded was set aside and the order of the court making the garnishee order absolute was also set aside. In his judgment Scrutton LJ said (at p. 624):

> One of the vital points in this case is whether there was, in October or November, 1930, any existing juristic person known as the Banque Industrielle de Moscou or the Russian equivalent of that name, on whom a writ or notice of a writ could be served, or against whom judgment in default of appearance could be given. I am aware that in *Jacques v. Harrison* ([1884] 12 QBD 165) the Court of Appeal has decided that if a person injuriously affected by a judgment by default and not a party to that action desires to set aside the judgment, he must apply either in the defendant's name, if he is entitled to use it, or in his own name, by a summons served both on the plaintiff and the defendant, to have it set aside. But I am aware of no case, and counsel could not refer me to one, when this has been applied to the case of a non-existent person, or defendant, on whom no summons can be served. Indeed, in my opinion, if it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void: see *Simmons v. Liberal Opinion* ([1911] 1 KB 966) (non-existent company); *Tetlow v. Orela* ([1920] 2 Ch 24) (plaintiff dead at time of writ); also the observations of Lord Parker in *Daimler Co v. Continental Tyre and Rubber Co (Great Britain)* ([1916] @ AC 307, 337), referred to by Viscount Cave in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* ([1925] AC 112, 130): 'But when the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed.'

[30] In the instant appeal, counsel for the appellant argued that a newspaper is a "person" and to support this contention referred to s. 3 of the Interpretation Acts 1948 and 1967 (Act 388) which provides that the word "person" includes a body of persons, corporate or unincorporate. He further argued that the 1st defendant does not have the *locus standi* to step into the shoes of the Malay Mail and hence would not be in a position to apply to set aside the judgment in default. We do not think that this line of argument is correct. We are of the view that the Malay Mail would not fall within the contemplation of the word "person" as

provided for in s. 3 of the Interpretation Acts 1948 and 1967. A name attached to a publication is similar to a brand name of a product and the product by itself is not a legal entity or even an artificial person like a company incorporated under company law. The "Malay Mail" is clearly not a "person" as such.

[31] We are also of the view that the 1st respondent has the *locus standi* and is the correct party to make the application to set aside the judgment in default obtained against the Malay Mail. The 1st respondent is the owner and publisher of the Malay Mail and is the person in law capable of making the application, the Malay Mail not being a legal entity. The Malay Mail is a publication of the 1st respondent and hence the 1st respondent is the person who has the right to be heard in court on any matters affecting or relating to the publication.

[32] For the reasons above, we dismissed the 1st and 2nd appeal with costs and ordered that the deposits be remitted to the 1st respondent to the account of taxed costs.

Judgment Of The Court In Relation To The 3rd Appeal

[33] With regards to the 3rd appeal, we had after hearing the parties reserved out judgment. We now give our decision.

[34] As discussed earlier, this appeal is with regards to the application made by the 1st respondent pursuant to O. 33 r. 2 of the Rules. Order 33 ("Mode of trial) reads:

> 1. ...
>
> 2. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.
>
> 3. ...
>
> 4. ...
>
> 5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter

A unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[35] The question posed by the 1st respondent by way of a preliminary point is whether it is entitled to rely upon the defence B of qualified privilege pursuant to s. 12 of the Act as it is the publisher of the Malay Mail and had published the said advertisement pursuant to an order of the court. The learned judge decided that the 1st respondent is entitled to rely upon such a defence and consequently ruled that the entire suit is C disposed of without the need for the matter to proceed to trial.

[36] We requested counsel to submit on 2 issues, namely:

(i) whether O. 33 r. 2 of the Rules is an appropriate procedure D to be used in defamation suits; and

(ii) whether malice is an issue that has been raised by the appellant as a response to the defence of qualified privilege under s. 12(1) of the Act raised by the 1st respondent and if so, whether the question of malice should be tried in a full E trial.

The Appellant's Submission

[37] Counsel for the appellant pointed out that on the issue of F malice, the learned judge said as follows:

> The only ground that the 1st Defendant would not be allowed to invoke Section 12 as a defence is if the publication was done with malice. On the facts of this case, there was no evidence of malice whatsoever by the 1st Defendant in advertising the publication.

G

Counsel argued that there was in fact malice. He then referred to the following facts, namely:

(a) the appellant had already advanced a notice to the 1st respondent that the bankruptcy notice was not true; H

(b) the 1st respondent did not bother to correct the said advertisement or withdraw the notice; and

(c) the 1st respondent did not forward any apology.

I

[38] Counsel then referred to several authorities relating to O. 33, r. 2 of the Rules, some of which we will later refer to, and argued that applications made under this rule is not a suitable method to dispose of a defamation suit by way of determining a preliminary issue.

[39] Counsel pointed out that under s. 12(1) of the Act, the 1st respondent cannot rely on the defence of qualified privilege if malice is in issue. He explained that the section itself has made an exception in regard to the issue of malice and pointed out that in the instant appeal, the issue of malice was raised in the pleadings and the 1st respondent has denied there was malice. As such, the learned judge erred when he overlooked the statutory exception and proceeded to consider the application in the 1st respondent's favour. Further, the defence of qualified privilege is also not available because the 1st respondent failed or neglected to correct or withdraw or apologise in regard to the said advertisement.

[40] Counsel's arguments in canvassing the appeal can be summarised as follows:

(i) this is not a case where O. 33 r. 2 of the Rules can be invoked;

(ii) the issues are complex and thus the matter should go for full trial;

(iii) the issue of malice "is at large to be established by *viva voce* evidence in trial";

(iv) section 12 of the Act cannot be invoked as defence when malice is raised;

(v) an issue which involves clearly with the whole subject matter of the action without any evidence is not a preliminary point and should not be ordered to be tried as such.

The 1st Respondent's Submission

[41] After referring to several authorities, some of which we will later refer to, counsel for the 1st respondent argued that the circumstances in the instant appeal is one of the situations in which the procedure under O. 33 r. 2 of the Rules is eminently suitable for disposal of the entire cause of action as it deals with

a single point of law which, if decided in favour of the 1st respondent, will be decisive and can dispose of the entire litigation. He then referred to s. 12(1) of the Act and pointed out that the section provides a statutory defence for the 1st respondent and is an absolute defence to this action and that all the 1st respondent would therefore have to establish are the following:

(a) that the "Malay Mail" is a newspaper;

(b) that the publication is an advertisement issued on the authority of a Malaysian court is in accordance with the requirements of written law; and

(c) that there is no issue of malice before the court and that the appellant has not raised the issue of malice.

[42] Counsel stressed that the publication of the said advertisement was pursuant to an order for substituted service made by the Kuala Lumpur High Court. He pointed out that the appellant has not raised the issue of malice in the statement of claim and there is no reply filed by the appellant to the 1st respondent's defence; as such, there is no issue of malice before the court. In support, counsel referred to O. 78 r. 3(3) of the Rules which he submitted is in *pari materia* with O. 82 r. 3(3) of the English Supreme Court Practice and for support referred to the commentary in *The Supreme Court Practice* - Malaysia Edition (1996 Reprint of 1979 Edition, Vol. 1) at p. 1297 which reads as follows:

> But if there is a lawful excuse for the publication (as for example, where it is an occasion of qualified privilege) by which the inference of law is *prima facie* rebutted, the onus is thrown upon the plaintiff of proving the existence as a fact of the malice necessary to maintain the action.

[43] Counsel then submitted that therefore the onus and burden is on a plaintiff to plead malice in a reply if the plaintiff wishes to rebut a lawful defence. In the instant appeal, the 1st respondent has pleaded a defence pursuant to s. 12 of the Act and the appellant failed to file a reply alleging malice as required under O. 78 r. 3(3) of the Rules. The appellant is therefore estopped from raising the issue of malice in these proceedings and, as there is no issue of malice before the court, there is no necessity for the court to consider whether malice can be proved.

[44] In conclusion, counsel submitted that this is one of the occasions when the facts and issue are eminently suitable for disposal pursuant to O. 33 r. 2 of the Rules. He argued that s. 12(1) of the Act was created specifically to, *inter alia*, protect a newspaper from libel actions where the newspaper was merely publishing notices or advertisements in accordance with an order of court and that once the court finds that a defendant is entitled to rely on s. 12(1) of the Act and in the absence of express malice, the court should be able to dispose of the action by way of a determination of a preliminary issue, rather than have the matter proceed to full trial which would lead to delay and additional costs.

[45] The background facts leading to this suit as digested from the appeal record are as follows:

(a) on 7 March 1994, MBf Finance Berhad obtained judgment in default against the appellant in the magistrate court, Kuala Lumpur for the sum of RM8,658.18 with interest at 22% per annum from 28 October 1993 until date of realisation and the sum of RM450 as costs;

(b) on 2 November 1999, a bankruptcy notice was issued against the appellant;

(c) by letter dated 31 August 2000 MBf Finance Berhad wrote to the appellant acknowledging receipt of payment by cheque for the amount of RM9,500 as full and final settlement of a credit card debt and stated therein that "we will proceed to close your file accordingly (upon cheque clearance)";

(d) on 6 September 2000, solicitors for MBf Finance Berhad as judgment creditor obtained leave for extension of time to serve the bankruptcy notice and for an order for substituted service of the bankruptcy notice to be effected by affixing a copy on the notice board of the High Court and at the last known address of the appellant at No. 11, Jalan 13/46, Bandar Tasik Selatan, 57000 Kuala Lumpur and by way of advertisement in a local newspaper; the order and the notice of substituted service was signed by the senior assistant registrar on 6 September 2000, ie, on the same date when leave and the order was granted;

(e) by letter dated 18 January 2001 solicitors for MBf Finance Berhad, Messrs TK Ooi, Loo & Partners wrote to the 1st respondent as follows:

> We act for MBf Finance Berhad.
>
> We have been instructed by our client to request you to publish at (sic) the "MALAY MAIL" the enclosed Notice in one (1) issue for one (1) day only that is 22/1/2001.
>
> Please let us have a copy of the paper in which the publication appears immediately upon publication.

(f) the said advertisement appeared in 22 January 2001 issue of the Malay Mail;

(g) consequently, the appellant instructed her solicitors to give a written notice to the respondents stating that the said advertisement was not true and notifying them to withdraw the same with an apology but met with no response and hence filed this suit.

[46] The above facts would seem to suggest that a delay in the settlement of the judgment sum led to the following chain of events, namely:

(a) judgment in default against the appellant for the sum of RM8,658.18 with interest and costs was obtained on 7 March 1994;

(b) the bankruptcy notice was issued on 2 November 1999, ie, more than 5 years later;

(c) the appellant paid the monies owing directly to MBf Finance Berhad sometime in August 2000, ie, about 10 months later after the issuance of the bankruptcy notice;

(d) a few days after the above payment was made, solicitors for MBf Finance Berhad applied for and obtained leave to serve the bankruptcy notice and the order for substituted service.

[47] The above facts would suggest that solicitors for MBf Finance Berhad were not aware that the judgment sum had been settled as the monies were paid directly to MBf Finance Berhad. Consequently, pursuant to the terms of the court order, solicitors for MBf Finance Berhad requested the 1st respondent, which

obviously were not aware of the above facts, to print the said advertisement in the Malay Mail. The 1st respondent, as the owner of the Malay Mail is now faced with this defamation suit.

[48] Can it be said, as purportedly alleged by the appellant, that there is malice of the part of the 1st respondent when it published the said advertisement? We find it preposterous to answer this question in the positive. What is malice? According to Osborn's *Concise Law Dictionary* (7th ed) the word "malice" means:

> Ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v. Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v. Pickles* [1895] AC 587).

[49] It cannot be disputed that the said advertisement is a notice issued by or on the authority of the court and hence is privileged pursuant to s. 12(1) of the Act unless the appellant can show malice. According to Osborn's *Concise Law Dictionary* (7th ed), the word "privilege" means:

> An exceptional or extraordinary right, immunity or exemption belonging to a person in virtue of his office or status, ...
>
> A man attacks the reputation of another at his own risk, but a defamatory statement is privileged as follows. (1) A statement is absolutely privileged when no action will lie for it even if it is made with malice (q.v.), e.g. statements made in the course of judicial proceedings. (2) Qualified privilege is where a person is not liable to an action for defamation unless he is guilty of malice, e.g. statements made in the course of duty, reports or proceedings, etc.

[50] As to what is malice has also been clearly explained in *Beach v. Freeson* [1972] 1 QB 14. In that case the defendant, a Member of Parliament, wrote a letter to the Law Society and an identical one to the Lord Chancellor, saying that he had been specifically requested by a constituent to refer the plaintiffs' solicitors' firm to the Law Society for investigation. He set out the constituent's

A complaints and stated that contrary to his usual practice he had complied with the request because he had received complaints from other constituents in the past concerning the plaintiffs' firm. In the plaintiffs' action against him for libel, he did not contend that the letter was other than defamatory but that the publication
B was on an occasion of qualified privilege. The plaintiffs denied that it was so privileged and contended that even if there was qualified privilege, the defendant had been actuated by malice. The court gave judgment for the defendant. The learned judge held that as the defendant had not been actuated by malice, the letter was
C privileged. In his judgment, Geoffrey Lane J said (at p. 26):

> Finally, have the plaintiffs proved that the defendant was actuated by express malice? Malice includes any spite or ill-will directed from the defendant at the plaintiffs. It also includes any indirect motive. That is to say, any intention on the part of the defendant
D to use the occasion, not merely for the purpose for which it is a subject of qualified privilege, but for some extraneous purpose of his own not connected with privilege. That is sufficiently demonstrated in *Nevill v. Fine Arts and General Insurance Co. Ltd.* [1895] 2 Q.B. 156, 171, per Lopes LJ:
>
E > The effect of the occasion being privileged is to render it incumbent upon the plaintiff to prove malice, that is, to shew some indirect motive not connected with the privilege, so as to take the statement made by the defendant out of the protection afforded by the privileged occasion. This he
F may do either by extrinsic evidence, by which I mean something outside the statement itself, or by intrinsic evidence, by which I mean something contained in the statement itself.

G **[51]** In the instant appeal, it is our view that when solicitors for MBf Finance Berhad applied for leave for extension of time to serve the bankruptcy notice and for an order for substituted service of the bankruptcy notice, it formed part and parcel of judicial proceedings to which there is absolute privilege. As to
H what is "absolute privilege" has been explained by Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society, Limited v. Parkinson* [1892] 1 QB 431; the learned judge said (at p. 451):

> The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer
I civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any

> proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This "absolute privilege" has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.

We are of the view that the position is the same in Malaysia.

[52] In the instant appeal, as discussed earlier, the facts seems to suggest that when solicitors for MBf Finance Berhad made the application for substituted service, they were not aware that the appellant had settled the outstanding sum due under the judgment a few days earlier as payment was made direct to MBf Finance Berhad. The facts would also seem to suggest that when solicitors for MBf Finance Berhad made the request to the 1st respondent for the publication of the said advertisement, they were still not aware that the judgment sum had been settled as payment was made direct to MBf Finance Berhad.

[53] The following rules of the Bankruptcy Rules 1969 ("the Bankruptcy Rules") deal with bankruptcy notices, namely:

> 91. (1) A bankruptcy notice shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed.
>
> (2) ...
>
> (3) ...
>
> (4) ... .
>
> 92. When applying for the issue of a bankruptcy notice, the creditor shall:
>
> (a) produce to the Registrar an office copy of the judgment or order on which the notice is founded;
>
> (b) file the notice, together with a request for issue;
>
> (c) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.

94. Particulars to be endorsed on notice.

(1) Every bankruptcy notice shall be endorsed with -

(a) the name and place of business of the solicitor who is suing out the notice, or if no solicitor is employed, with a memorandum that it is sued out by the creditor in person;

(aa) the name and national Registration Identity Card number of debtor.

(b) ...

(2) ...

97. Service of notice.

A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.

[Rule 109 of the Bankruptcy Rules which relates to "Service of Creditor's Petition (the side-note reads "Personal Service") provides as follows:

A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.]

[54] In relation to substituted service, r. 110 of the Bankruptcy Rules provides:

(1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.

(2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

[55] Thus, in the instant appeal, arising out of the order of the court on 6 September 2000, solicitors for MBf Finance Berhad requested the 1st respondent to publish the said advertisement. In relation to this, the appellant aver that the 1st respondent "acted intentionally and *mala fide* when they advertised the libel as their

only interest is to make profit out of the said advertisement". We do not think that under such circumstances, a mere reproduction by the 1st respondent of a notice of substituted service in the Malay Mail upon a payment of a fee or a service charge can be said to be *mala fide*. The objective of the said advertisement is inform the appellant that bankruptcy proceedings have been instituted against her and that upon its publication in the Malay Mail, the effect in law is that the bankruptcy notice have been duly served upon her. As such, we cannot see how it can be argued that there was malice on the part of the 1st respondent. There is no allegation of ill-will or an indirect motive. There is no allegation that the appellant and the 1st respondent had ever met; they do not seem to know each other. Neither is there any allegation that she had dealings with the 1st respondent prior to the publication of the said advertisement. We are of the view that the 1st respondent has the absolute right to publish the said advertisement. They clearly acted within the law.

[56] The publication of the said advertisement in the Malay Mail shall be privileged, unless it is proved to be made with malice, pursuant to s. 12 of the Act read together with para. 3 of Part I of the Schedule to the Act. A person who requested for the publication of an advertisement would have to pay for that service. What ill-will can be imputed when the 1st respondent is not a party to the bankruptcy proceedings and clearly would not even know whether the debt or judgment sum has been settled by the appellant. One cannot even impute any knowledge to the 1st respondent whatsoever even if the application for substituted service was improper. In *Searles v. Scarlett* [1892] 2 QB 56 an action for libel was dismissed on the ground that the publication of a mere copy of what is contained in a register of judgments is privileged. The facts of the case are as follows. The plaintiff was a hotel-keeper and the defendant was the secretary of the Ramsgate Trade Protection Association. An extract from the register of county court judgments was published in The Weekly Journal of the Associated Trade Protection Societies of Great Britain and Ireland issued by the Ramsgate and District Trade Protection Association, stating that judgments had been obtained in the county court against the persons named, among whom was the plaintiff. The journal had a considerable circulation among tradesmen in the neighbourhood of Ramsgate. A note was appended to the effect that the statement was taken from the

register of county court judgments, but that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid.

[57] The plaintiff brought an action for libel alleging by way of innuendo that the statement meant that a judgment had been obtained against him in the county court, which remained unsatisfied, and that he was insolvent and a person to whom credit ought not to be given. The judgment was in fact satisfied at the time of the publication of the alleged libel. It appeared to have been through some mistake that the judgment was ever entered on the register as the plaintiff had paid the amount earlier. The trial judge decided that the words complained of were not capable of the defamatory meaning alleged. An application for a new trial of the action was made but was dismissed by the Court of Appeal on the ground that the publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, and which by law the public are entitled to inspect, is privileged and as there was no evidence of actual malice, the action was not maintainable. In his judgment, Lord Esher, MR said (at pp. 59-61):

> If such a list of judgments had not been made under any legislative authority, but had been kept by a private person for his own purposes, then it seems to me that there might be no privilege. But the ground upon which the privilege has been put is this. It has been said that these judgments are the judgments of a court of law instituted by the legislature, and it is directed by the law that a register shall be kept of them, which is to be open to public inspection. The legislature has enacted that people may go and look at the register, obviously not for the purpose of mere curiosity, but that they may act on the information thereby obtained; so that any tradesman who is considering whether he shall give credit to a person may inspect the register and see whether there are judgments against him upon it. The law provides that the register shall be a public document which anybody may consult for this purpose. That being so, the publisher of such a list as this is only doing for the public what they may do for themselves, and is only giving that information to the public and to tradesmen which the legislature has thought it right they should have. Therefore it is said that the publication of such a list is privileged and an action will not lie for it, unless

the privilege has been abused. If the publication has been from an indirect motive, eg, for the purpose of extorting money, or if there were any actual malice, eg, if the publication were to gratify a feeling of revenge, then, no doubt, the privilege would be rebutted; but as long as the publication is *bona fide* and without actual malice, it is privileged. Of course, if a libel, however malicious, is true, it is not actionable. The doctrine of privilege assumes that there is a libel and that it is not true. There is clear authority, in my opinion, on the subject. To my mind, this case is governed by *Fleming v. Newton* (1 HLC 363). In order that it may be so governed, I do not think it is necessary that the two cases should be exactly the same in their circumstances. I think that in that case the House of Lords laid down as the very foundation of their judgment a principle which will govern this case. That principle was enunciated by Lord Cottenham, LC, not, it is true, in an action of libel, but, I think, as a principle which must govern a case of libel. It is, that where there is a register kept by virtue of an Act of Parliament for the purpose of giving information to the public, then, if a person makes a copy of it and publishes it, although he does so for the purpose of warning the public or tradesmen about to give credit, yet, if all that he does is to publish a copy of the register which is intended to be a public document, it is a privileged publication. He said: "From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to this register, and of all the public the appellants have the highest interests in the knowledge of its contents. They are engaged in mercantile affairs in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register, is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it; but the transaction disproves any malice, and shews a legitimate object for the act done." I think that what he so said was intended to apply even if the action were one for libel. That case has since been treated by every judge who has had to deal with such cases as this as laying down the governing rule in the matter. There is for instance the decision in *Annaly v. Trade Auxiliary Co* (26 LR Ir. 11, 394) in the Irish Court of Appeal, which is not binding on us no doubt, but which is entitled to the highest respect. That was an action of libel in respect of a publication in Stubbs's Weekly Gazette. It came, in the first instance, before the Irish Court of Exchequer when Palles, CB,

A was presiding. He said that the case was governed by the principle laid down by Lord Cottenham in *Fleming v. Newton*, with which he entirely agreed. The case then went before the Court of Appeal in Ireland. The first judgment was given by Lord Ashbourne, C. He took the reasoning in *Fleming v. Newton* and
B applied it to the case before the Court. He said that there was a public officer bound to register all judgments lawfully brought to him in books open to the public, and intended essentially to be public, and that, when the judgment was registered, all the particulars copied into the register were published for all purposes and became public property; and that being so, when a society or
C person merely published what was contained in the register, for the purpose of giving information to tradesmen, which by law the public were entitled to, the publication was privileged and no action lay, not because the matter might not be libellous, but because it was privileged.

D **[58]** Under the circumstances discussed above in relation to the instant appeal, we are of the view that the said advertisement is absolutely privileged and the learned judge was correct in making the decision that he did. The said advertisement was published on the authority of a court within Malaysia and r. 110 of the
E Bankruptcy Rules read together with r. 97 of the same clearly provides that a bankruptcy notice can be served by way of substituted service.

[59] The other issue for us to determine is whether O. 33 r. 2
F of the Rules is an appropriate procedure to be used in defamation suits. In his submission counsel for the appellant argued that such a procedure is not suitable in a libel action and for support referred to *Morris and Another v. Sandess Universal Products* [1954] 1 All ER 47. In that case, the Court of Appeal was of the view
G that the question raised in a libel action was not a proper subject to be raised and disposed of as a preliminary point of law under RSC, O. 25 r. 2 (which is in *pari materia* with O. 33 r. 2 of the Rules). The facts of the case are as follows. The defendant company is a distributor and retailer of carbon papers, inked
H ribbons and similar articles and had employed each of the plaintiffs as a sales manager each at a weekly salary with commission. On 20 June 1952, each of the plaintiffs agreed orally to determine their respective employments by the defendant company by tendering their resignation and the defendant company accepting
I the same. Subsequently in a circular letter addressed to their customers, the defendant company stated that they had dismissed

the plaintiffs who had now no connection whatsoever with the defendant company. The plaintiffs sued for libel, alleging that the words used by the defendant company meant that the plaintiffs had been guilty of some discreditable conduct, and the defendant company contended that the words complained of were incapable of a defamatory meaning.

[60] Consequently, it was ordered "that there shall be tried as a preliminary point of law the issue whether the words complained of in the statement of claim have in their ordinary signification any defamatory meaning or are capable of bearing the alleged defamatory meaning other than their ordinary meaning having regard to the facts and matters relied upon herein". On that issue, tried as a preliminary point of law under RSC, O. 25 r. 2, Lord Goddard, CJ decided that the words "dismissed from our employ" in a letter of the kind in question were capable of a defamatory meaning.

[61] The defendant company's appeal to the Court of Appeal was dismissed. In his judgment, Jenkins, LJ said (at p. 51):

> ... With the question whether or not they are defamatory, this court at this stage has nothing whatever to do. That will be a question for the jury when the case comes to be tried.
>
> Accordingly, I would dismiss this appeal. I must say that, in my judgment, the procedure under RSC, Ord 25, r 2, is most unsuitable for the purpose for which it has been used in this case. If recourse is to be had to that rule on the question whether or not words complained of in a libel action are capable of a defamatory meaning, it seems to me that the practice may grow up of splitting libel actions into two stages, the first being concerned with the aspect of the case with which we have been occupied today and the second being the trial of the case itself in the event of the defendant's failing to put a summary end to the proceedings on the preliminary issue with which we are now dealing. That appears to me to be a most undesirable practice, and, in my view, a question such as that now raised is not a proper subject for an application under the procedure prescribed by RSC, Ord 25, r 2.

[62] Counsel for the appellant also referred to *Tilling v. Whiteman* [1979] 1 All ER 401 where the question posed to the court of first instance as a preliminary point of law was based on hypothetical facts. The dispute was in relation to the Rent Act 1968. The appeal to the Court of Appeal was dismissed and the

appellant appealed to House of Lords. In allowing the appeal and remitting the case to the court of first instance for trial, Lord Wilberforce made the following observation on the practice of courts of first instance allowing preliminary points of law to be taken; he said (at p. 403):

> Miss Whiteman did not yield up possession as she had agreed, so the owners brought proceedings in the Canterbury County Court for possession and other relief. Pleadings were exchanged, and the case came on for trial in May 1977 with both sides legally represented. The judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house as a residence. **So the case has reached this House on hypothetical facts, the correctness of which remain to be tried**. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional. [Emphasis added]

[63] In *Allen v. Gulf Oil Refining Ltd* [1981] 1 All ER 353, in an action brought by the plaintiff for nuisance, the court had to deal with a complex preliminary point. The facts are as follows. By the Gulf Oil Refining Act 1965, an oil company ('Gulf Oil') were authorised to construct certain works in connection with an oil refinery they intended to establish at Milford Haven. In 1967 Gulf Oil built a large oil refinery on the land referred to in the Act and which they had compulsorily acquired for the purpose, and constructed various jetties and railways in connection with it. The plaintiff who lived in the near neighbourhood of the refinery brought an action for nuisance. Gulf Oil resisted the claim by a plea of statutory authority. On a preliminary issue the judge ordered that Gulf Oil could rely on the 1965 Act as having authorised the construction and operation of the oil refinery. The plaintiff appealed to the Court of Appeal which reversed the judge's decision. Gulf Oil appealed to the House of Lords. The appeal was allowed. In his opinion, Lord Wilberforce observed as follows (at p. 355):

> My Lords, I and others of your Lordships have protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is frequently so where they reach this House, they do not serve the cause of justice. The present is such an example. The question as originally framed was clearly inept. It was recast by Kerr J into an improved form. But both judges in the Court of Appeal (Lord Denning MR and Cumming-Bruce LJ) ([1979] 3 All ER 1008, [1980] QB 156) found it either unintelligible or unanswerable; so I believe do some at least of your Lordships. The fact is that the result of the case must depend on the impact of detailed and complex findings of fact on principles of law which are themselves flexible. There are too many variables to admit of a clear-cut solution in advance.

[64] Counsel for the appellant also referred to *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 CLJ 539; [1995] 4 CLJ (Rep) 275 where Chan Sek Seong J (at p. 279) said:

> Thirdly, we are in full agreement with counsel with respect to the powers of the court under O. 33 r. 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter. It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law. An action may involve many disputes on the facts as well as on the law, some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.

and at p. 282 said:

> Taking all the points made by counsel for the appellants, we may state as a general rule that the court will not exercise its power under O. 33 r. 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). It is a matter of discretion for the court to exercise in the

A circumstances of each case, bearing in mind that 'Preliminary points of law too often are treacherous short cuts. Their price can be ... delay, anxiety and expense' (per Lord Scarman in *Tilling v Whiteman* ([1979] 2 WLR 401; [1979] 1 All ER 737 (folld)) at p 410).

B **[65]** In *Everett v. Ribbands* [1952] 1 KB 112, the court was of the view that where a point of law, if decided in one way is going to be decisive of litigation, then advantage should be taken of that facility as provided under the Rules of Court. That case was referred to with approval in *Carl Zeiss Stiftung v. Herbert Smith &* C *Co* [1969] 1 Ch 93. The facts of *Carl Zeiss Stiftung* are as follows. The plaintiff, a corporate entity carrying on business in East Germany, brought an action in England against another organisation of the same name carrying on business in West Germany, claiming that the West German company had been D guilty of passing off and infringing trade marks and, in addition, that all the property and assets of the West German company belonged to the plaintiff. The plaintiff brought a separate action against the defendants, two firms of solicitors acting for the West German company in the main action, claiming that the defendants E were liable to pay over all the moneys that they had received from the West German company for fees, costs and disbursements. The trial judge refused to order trial of a preliminary issue on a point of law in the action against the solicitors.

F **[66]** In allowing the appeal the court held that the test whether the trial of a preliminary issue on a point of law should be directed was whether the point of law, if decided in one way, would be decisive of the litigation, and the point of law in the present case would dispose of the claim against the solicitors irrespective of the G decision in the main action; accordingly the question of law whether the defendant solicitors would be accountable to the plaintiff in respect of fees, costs or disbursements received by them in good faith in their capacity as solicitors for the defendants in the main action should be tried as a preliminary issue. In delivering H the judgment of the court, Lord Denning MR said (at pp. 98-99):

> The judge refused to order a preliminary issue. He said that the main action should be fought out to its conclusion before the trial judge; and then this second action against the solicitors should be tried before the same judge.

I

I am afraid that I cannot agree with the judge's decision. These solicitors ought to know where they stand. They should be able to conduct the litigation without having a sword suspended over their heads. It is not a hypothetical issue. It is a practical issue of urgency. It is very desirable that it should be decided as soon as possible before many further costs are incurred.

I know that it has been said on one or two occasions that a preliminary issue should be ordered only when, whichever way it is decided, it is conclusive of the matter. That was said by Lord Evershed MR in *Windsor Refrigator Co Ltd v. Branch Nominees Ltd* ([1961] Ch 88; [1961] Ch 375, 396; [1961] 2 WLR 196; [1961] 1 All ER 277, CA); and Harman LJ in *Yeoman Credit Ltd v. Latter* ([1961] 1 WLR 828, 835; [1961] 2 All ER 294, CA). I do think that is correct.

The true rule was stated by Romer LJ in *Everett v. Ribbands* ([1952] 1 KB 112; [1951] 2 All ER 818; [1952] 2 QB 206; [1952] 1 All ER 823):

> Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of the pleadings, or very shortly after the close of pleadings.

I have always understood such to be the practice. I quite agree that, in many cases, the facts and law are so mixed up that it is very undesirable to have a preliminary issue. I always like to know the facts before deciding the law; but this is an exceptional case. The solicitors have received in good faith moneys for the defence of this action. They ought to know at once whether they safely go on receiving them. If the issue of law is decided in their favour, it will dispose of the claim against them, irrespective of the main action. I would order a preliminary issue to be tried.

[67] In *Keays v. Murdoch Magazines (UK) Ltd and Another* [1991] 4 All ER 491 the Court of Appeal held that the court has jurisdiction in defamation cases to decide on a preliminary point of law and that on the facts of the case, the trial of the preliminary issue was appropriate and to that extent the appeal was allowed. In its judgment, the Court of Appeal considered *Morris v. Sandess Universal Products (supra)*. The facts of *Keays* are as follows. The defendants, the publishers and the editor of a magazine, published in the October 1989 issue under the heading 'Laughing all the way to the bonk' an article describing the activities of a number

of women who had had affairs with prominent men and who had then received or in one case refused substantial sums from newspapers in return for accounts of their sexual relationships with the men concerned. Certain paragraphs of the article referred specifically to the plaintiff and her relationship with a Cabinet minister, who was the father of her child. The article stated, *inter alia*, that there was one aspect of the plaintiff's story which put her firmly in the company of the other women referred to in the article, namely the man involved was famous and had a reputation to protect, The article continued: 'It's a reminder that Kiss 'n' Tell is a thoroughly British pastime'.

[68] The plaintiff brought an action against the defendants claiming damages for libel, alleging that the words complained of in the article in their natural and ordinary meaning meant that the plaintiff had had the affair with the Cabinet minister with the intention of later publishing her revelations in a 'Kiss 'n' Tell book' which placed her in the same position as other women who had had affairs with famous men in order to make money by selling their explicit memoirs to the tabloid press.

[69] The defendants applied to have the question whether the words complained of by the plaintiff were capable of bearing the meaning pleaded in the statement of claim tried as a preliminary issue. Both the master and the judge dismissed the application on the ground that the court had no jurisdiction in a libel action to order trial of a preliminary issue on the defamatory meaning. The defendants appealed to the Court of Appeal. The parties asked that, if the court held that there was jurisdiction to order the trial of the preliminary issue sought, it should in the circumstances itself decide that issue. In delivering the judgment of the court, Neal LJ (at pp. 497-498) said:

> It is also relevant to consider the alternative to the trial of a preliminary issue. At one time it seems to have been the practice to seek a ruling from the judge on the question whether the words were capable of the alleged defamatory meaning at the conclusion of the case for the plaintiff or even at a later stage of the trial. We were told that in some recent cases the defendant has invited the judge to make such a ruling at the outset of the hearing as a preliminary point. Whichever practice is followed it means that the parties will have prepared for trial and that very substantial additional expense will have been incurred.

> It has been suggested that sufficient protection is given to defendants by the existence of the right to apply to strike out a pleaded meaning which is considered extravagant and unfit to be considered by the jury. But, according to the law as clearly stated by Lord Guest and Lord Pearson in *Morgan v. Odhams Press Ltd* [1971] 2 All ER 1156 at 1173, 1182, [1971] 1 WLR 1239 at 1257, 1268, on the hearing of an application to strike out the question to be determined is not whether the words are capable of bearing a defamatory meaning but whether they are arguably capable of bearing such meaning. It is, I believe, the experience of practitioners that it is rare for an application of this nature to succeed.
>
> I am satisfied that the jurisdiction exists to order the trial of a preliminary issue to determine whether the words complained of are capable of bearing a particular meaning and that this jurisdiction should be exercised in appropriate cases where it is apparent to the court that a saving of costs would be achieved. If such an application by a defendant succeeds in full the action will be at an end, unless the plaintiff seeks and is granted an amendment to plead some alternative meaning. Even if the application is only partially successful, a saving of costs may well be effected by limiting discovery and the preparation of evidence to that meaning or those meanings which the court has ruled the words are capable of bearing. Furthermore, I see no reason in principle why, if the defendant seeks to put forward a meaning which the plaintiff seeks to challenge, the court should not, in an appropriate case, rule on the defendant's meaning at a preliminary stage. I should add, however, that I anticipate that there will be many cases where the trial of a preliminary issue will be wholly unnecessary and where it would itself add to the expense of the proceedings and would occasion unjustified delay.

[70] It is our view that the instant appeal is clearly a case where the determination of the question posed would substantially dispose of the whole action. The trial of the preliminary issue has resulted in a substantial saving of time and expenditure in respect of the trial of the action as a whole. We cannot see why advantage should not be taken of such a facility as provided under O. 33 r. 2 of the Rules. Section 12(1) of the Act provides a statutory defence for the 1st respondent and having shown that the publication of the said advertisement, issued on the authority of the High Court, is in accordance with written law, and the appellant having failed to raise an arguable case that the 1st respondent was actuated by malice in publishing the said

advertisement, we cannot see what further light would be thrown if the matter goes for trial. The preliminary point raised was not a complex issue which require the matter to go for full trial. It was clearly not based on hypothetical facts. It dealt with a single point of law which, after having been decided in favour of the 1st respondent, was decisive and has disposed of the entire litigation. The appellant failed to show any spite or ill-will directed from the 1st respondent to her goodself or even any indirect motive. The publication of the said advertisement was absolutely privileged and as such, we are of the view that the learned judge was correct in dismissing the suit as the determination of the question posed in the affirmative has substantially dispose of the whole action.

[71] We cannot find anything wrong with the decision of the learned judge and as such, for the reasons we have given, we unanimously dismiss the 3rd appeal with costs and order that the deposit be remitted to the 1st respondent to the account of taxed costs.